

Keeping Secrets

The President refused, August 31, to give Senator Fulbright's Foreign Relations Committee a copy of the Pentagon's five-year foreign military assistance plan, citing "executive privilege" as his reason. Two days later it was reported, and then partially confirmed in Secretary Rogers' press conference, that news leaks out of the State Department were being investigated with lie-detector tests given to "high-ranking" department officials. These two incidents may have been totally unrelated, and their timing fortuitous. Or they may represent a deliberate tightening on all fronts of the administration's treatment of "official secrets," maybe even a considered response to the Supreme Court's Pentagon Papers decision.

The Court's ruling that no judicial decree may constitutionally prevent the publication of a news story or copy of a government document leaked to the press can be taken as teaching the virtue of self-reliance. The Court said, in essence, that under existing statutes once a government secret is out, the First Amendment makes it public property and forbids its censorship or suppression. So the sole line of defense for official secrets is control by the executive departments of their own personnel and confidential material.

Hard-nosed investigation of State Department leaks is plainly one way of deterring unwanted disclosures. Secretary Rogers - apparently tutored by the opinions of some Supreme Court Justices who indicated, in lengthy asides, that they saw no constitutional difficulty in after-the-fact criminal prosecutions of those who disclosed top-secret information - asked reporters, at his press conference, with shocked innocence, "Is there anything wrong with investigating a crime when it occurs?" It seems that a *New York Times* article in mid-July had given details of secret bargaining positions taken by US negotiators at the SALT talks, and, according to the secretary, several executive departments then applied for an FBI investigation "to find out whether a crime was committed and who committed it." (The Espionage Act of 1917 - used to indict Daniel Ellsberg and much cited in the Pentagon Papers case - makes it a crime to disclose defense information which could be used "to the injury of the United States.") Mr. Rogers announced that he was satisfied from the results that there had been no violation, but the first *Times* story on the FBI's efforts reported, significantly, that previously available State Department officials had recently taken to not answering newsmen's telephone calls.

Could Mr. Rogers - a former attorney general and lawyer with a successful private practice - really have been unaware that the prospect of a visit from an FBI agent carrying a polygraph machine would make a foreign service officer reluctant to chat with a reporter even on subjects whose disclosure is not remotely criminal? Brandishing the threat of criminal investigation and prosecution over the heads of the foreign service - a group never noted for independence or daring - equals in subtlety the administration's

recent promise to discharge any HEW or Justice Department bureaucrat who shows excessive zeal in favor of busing for school desegregation. Granting, as one must, that strong internal controls are needed to guard secret foreign-policy and defense information, there are plainly more suitable methods for achieving the goal than the FBI's heavy knock on the door.

The claim of privilege made to the Senate Foreign Relations Committee can be faulted for the same reason: it goes beyond what good judgment warrants. "Executive privilege" has always been a legal talisman of last resort for the federal executive departments. It has been much discussed in theory and has often been tossed in as an alternate ground for a department's refusal to produce documents which it has a host of other legal reasons for keeping to itself. It has seldom, if ever, been relied upon as exclusively and unashamedly as it was by Mr. Nixon in August.

There are many colors to the cloak of "executive privilege," and some have very respectable and ancient historical antecedents. In the 1807 trial of Aaron Burr, President Jefferson responded to a subpoena issued by Chief Justice John Marshall (who was sitting as the trial judge) and sought exemption for documents relating to "mere executive proceedings" involving diplomatic relations with Spain and France. The request was allowed because "secrets of state" had been recognized as a proper subject of confidentiality. And, as applied to foreign-policy or defense secrets, there have been later judicial decisions - including one by the Supreme Court in 1953 - which have upheld claims of "executive privilege." The courts have even permitted the executive to decide on its own - without review by any court - whether disclosure would harm the public interest. (Interestingly enough, Robert H. Jackson who, as attorney general, ruled in 1941 that this was a decision which the executive was to make on its own, voted on the Supreme Court, in dissent, that a judge should review the documents and decide whether privilege was properly claimed.)

There has not, though, been any court test of the availability of "executive privilege" in response to the request of a congressional committee. But on the theory that the separation of powers provided by the Constitution gives the executive the same rights vis-a-vis the Congress as it has in relation to the judiciary, past administrations have assumed that the court decisions apply to congressional requests.

One obvious difference, however, is that the same secrecy justifications do not apply to the Congress. Officials of executive departments engaged in foreign policy and military affairs regularly participate in executive sessions with congressional committees in which secret information is discussed. And Senator Fulbright was quick to point out, in answer to the President's privilege claim, that his committee had requested the information strictly on a "confidential

basis." Maybe this is why the President's memorandum explaining the reliance upon executive privilege did not emphasize - as one might have expected - the sensitive nature of long-range plans for foreign military assistance. Rather, it relied on the least sustainable ground for invoking the privilege - that the papers were only "internal working documents" and that "privacy of preliminary exchange of views between personnel of the executive branch" is necessary "for the successful administration of government."

The proposition that civil servants need "privacy" in order to exchange ideas is as old as bureaucracy itself, and it has been written into various laws, including the 1966 Freedom of Information Act. Specifically exempted from that act's general principle that department records must be accessible to the public are "inter-agency or intra-agency memorandums or letters which would not be available by law." Even assuming that there is generally more social utility in keeping internal governmental memoranda secret than in subjecting them to public scrutiny - a conclusion which cannot be lightly reached in view of the revelations of the Pentagon Papers - there is a plain difference between what ought to be disclosed when any curious member of the public asks and what must be disclosed in answer to a judicial subpoena or congressional demand. The effect of the President's use of executive privilege to protect internal memoranda is to elevate a generally useful rule-of-thumb, which Congress has occasionally approved, to an unconditional constitutional option of refusal, exercisable entirely at the will of the executive.

This is the broadest reach of executive privilege, and represents a position on secrecy that the Supreme Court refused to accept in its 1953 decision. If applied across-the-board it would mean that an executive department could refuse to disclose any paper in its files to a court or to Congress, no matter how nonsensitive the subject and how remote the possibility of any public harm from disclosure. It would make the privilege a sanctuary for embarrassed public officials and keep them from ultimate accountability for their conduct while in office. Patrick Henry gave the most eloquent rebuttal to this claim almost 200 years ago: "To cover with the veil of secrecy the common routine of business, is an abomination in the eyes of every intelligent man and every friend to his country."

The Washington Merry-Go-Round

CIA Eavesdrops on Kremlin Chiefs

By Jack Anderson

The Central Intelligence Agency has been eavesdropping, incredibly, on the most private conversations of Kremlin and other world leaders.

For obvious security reasons, we can't give a clue as to how it's done. But we can state categorically that, for years, the CIA has been able to listen to the kingpins of the Kremlin banter, bicker and backbite among themselves.

A competent source, with access to the transcripts of the private Kremlin conversations, tells us that the Soviet leaders gossip about one another and complain about their ailments like old maids.

It is evident from the conversations that Leonid Brezhnev, the party chief, sometimes drinks too much vodka and suffers from hangovers. Premier Kosygin, however, is in poor health, and his complaints are more authentic.

One of their favorite pastimes is visiting a private clinic to get their aches soothed. Like fat capitalists at the end of a hard day in their plush suites, the Kremlin chiefs stop by for steam baths, rubdowns and other physical therapy.

Brezhnev, in a typical conversation, might grump about

his back pains and announce he's going to have Olga give him a massage. "Olga Oh ho!" President Nikolai Podgorniy might chortle, as if he is quite familiar with the masseuse.

Mao Close Up

Like the Kremlin crowd, the Red Chinese leaders are far less forbidding in private than they appear to the world. The mighty Mao Tse-tung, his appointed successor Lin Biao and Premier Chou En-lai are tired, old revolutionaries slowed down by the ravages of age.

Mao shares Brezhnev's taste for good food, strong drink and a woman's touch. But he is less grumpy and grim than the Soviet leader. There's an avuncular affability about Mao, and he has an infectious laugh.

But at 77, he walks slowly, though erectly, with his left arm dangling strangely. The CIA concluded from a careful study of film shots that Mao's eyes are dim from age. He seems unable to recognize old comrades until they are face to face.

The CIA has also caught the old fox using a ringer to stand in for him at long, dreary public parades. But it was the real Mao who made that publicized plunge in the Yangtze a couple years ago. The picture

of his moon-face bobbing above the waves was carefully scrutinized by the CIA, which concluded after measuring his ears and other facial features that the swimmer was no doubt.

Pictures of world leaders routinely are blown up and studied by CIA doctors for clues to their health. Their behavior is also analyzed by CIA psychiatrists and psychologists.

Footnote: One of the CIA's greatest triumphs, heretofore untold, was fishing out some of the late Premier Nikita Khrushchev's excrement before it was flushed down the toilet. The great bathroom caper was pulled during his 1959 state visit to the U.S. The filched feces was eagerly analyzed by CIA medics who concluded that Khrushchev then was in excellent health for a man of his age and rotundity.

Strong-Arm Tactics

One of the most notorious regimes in the American labor movement may be near its end.

Pete Weber, the strongman, \$136,000 a-year boss of the Operating Engineers in New Jersey, has gone to jail for extortion. His brother Ed, who ran for his job, has been beaten by Larry Cahill, an honest, veteran union man.

But there is life in the old Weber machine yet. Cahill's supporters were subjected to bullyboy tactics to coerce them going along with Ed Weber.

Cars with Cahill bumper stickers had their tires slashed and windows broken. Three Cahill men were beaten up. Others were laid off work by pro-Weber union foremen. Even the ballots were deceptively designed so that Cahill supporters would mark their ballots for Ed Weber.

Nevertheless, the challenger squeaked home by 145 votes. The count is official and final under the union constitution. But the Weber men are now trying to arrange a "recount". It would be carried out of course, by pro-Weber incumbent officers.

The man who could stop all this is the Engineer's international union President Hunter Wharton. Reached by telephone while eating lunch at La Chatelaine, a swanky Washington restaurant, Wharton made it clear he is still unwilling to back the Weber crowd.

He claimed he had no official knowledge of Cahill's upset win. "We're not doing anything either way," he said. "We're not in the middle of it one way or another."

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